APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 5, 2003

UNITED STATES COURT OF APPEALS
FOR ELEVENTH CIRCUIT

No. 02-12265

D.C. Docket No. 01-01249 CV-ODE-1

CHARLES KIBAARA NYAGA,
DOIN KAINYU KIBAARA,

Plaintiffs-Appellees,

v.

JOHN ASHCROFT, as Attorney General of the United States, ROSEMARY MELVILLE, District Director, Atlanta Division of the Immigration and Naturalization Service,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Georgia

(March 5, 2003)

Before EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

Appendix A

PER CURIAM:

The Defendants—John Ashcroft, Attorney General of the United States, and Rosemary Langley Melville, District Director of the Atlanta Division of the Immigration and Naturalization Service (INS)—appeal from the district court's order granting mandamus relief to the Plaintiffs, Charles Kibaara Nyaga (Nyaga) and his wife, Doin Kainyu Kibarra (Kibarra).[1] Nyaga, a resident alien, qualified for a diversity immigrant visa through the Fiscal Year 1998 Diversity Visa Program's random selection process. He submitted an application to adjust his status pursuant to 8 U.S.C. § 1255(a), but the INS did not adjudicate his application before fiscal year 1998 ended. In 2001, the Plaintiffs sought an order to compel the Defendants to adjudicate Nyaga's adjustment application. Invoking its mandamus jurisdiction, the district court concluded that the INS has a clear, non-discretionary duty to process Nyaga's application and ordered the Defendants to process Nyaga's application as though fiscal year 1998 had not ended. We conclude that even if the INS has a non-discretionary duty to process Nyaga's adjustment application, Nyaga's case was moot because as of midnight on September 30, 1998, he was no longer eligible to receive a diversity immigrant visa. We vacate the district court's order and remand with instructions to dismiss as moot.

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1. The parties apparently agree that Nyaga's wife's name is "Kibarra" notwithstanding the fact that her name was spelled "Kibaara" in the complaint.

Appendix A

I. BACKGROUND

1. The Diversity Visa Program

Through the diversity visa program, a limited number of immigrant visas are made available to individuals from countries that historically have had low rates of immigration to the United States. 8 U.S.C. § 1153(c) (2002). Under the program, the Attorney General identifies "low-admission states" and allocates diversity visas (immigrant visas made available through the diversity visa program) to natives of these states according to a formula established by statute. 8 U.S.C. § 1153(c)(1). A diversity visa enables the recipient to move to the United States as a lawful permanent resident (or, alternatively, to remain in the United States as a lawful permanent resident if the recipient is already lawfully within the United States and if the Attorney General adjusts the recipient's status) under the Immigration and Nationality Act. To be eligible for a diversity visa, an alien must have a high school education or have, within five years of the date of application for the visa, at least two years of work experience in an occupation that requires at least two years of training or experience. 8 U.S.C. § 1153(c)(2). If an alien is entitled to receive a visa under the diversity visa program, the alien's spouse and minor children are entitled to the same status. 8 U.S.C. § 1153(d).

The United States Department of State administers the diversity visa program. Eligible applicants must file a petition to be considered for a diversity visa, and after the filing period has ended, a computer randomly orders the petitions. 22 C.F.R. § 42.33(c) (2003). The State Department then

selects, in rank order, a quantity of petitions estimated to be sufficient to ensure, to the extent possible, that all diversity visas authorized for issuance are issued. *Id.* These selected applicants—commonly referred to as diversity visa program "lottery winners"—are notified of their selection and receive instructions on how to apply for a diversity visa. *See* Notice of Registration Period and Requirements for the Fourth Year of the Diversity Immigrant Visa Program, 61 Fed. Reg. 58730, 58731 (November 18, 1996).

Selection as a "lottery winner" does not ensure that an applicant will receive a diversity visa. The total number of lottery winners exceeds the number of diversity visas available under the diversity visa program. *See id.* ("Being selected as a winner . . . does not automatically guarantee being issued a visa even if the applicant is qualified, because the number of entries selected and registered is greater than the number of immigrant visas available. Those selected will, therefore, need to complete and file their immigrant visa applications quickly."). The process to obtain a visa is lengthy: the applicant must submit numerous documents to the National Visa Office (including a passport, a birth certificate, police certificates, court records, prison records, military records, and evidence of either education or work experience) and attend a visa interview. 8 U.S.C. § 1202.

Diversity visa lottery winners who reside abroad must travel to a United States embassy to complete the visa eligibility process. If a lottery winner is lawfully present in the United States, however, the alien may remain in the United States and apply to the INS to adjust his status to that of a lawful permanent resident. 8 U.S.C. § 1255(a).

This adjustment procedure enables a lottery winner lawfully residing in the United States, such as an alien with a student visa, to receive an immigrant visa without returning to his native country. The Attorney General, at his discretion, may adjust an applicant's status to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for adjustment of status, (2) the alien is eligible to receive an immigrant visa and is admissible for permanent residence, and (3) a visa is immediately available to the alien at the time the application is filed. 8 U.S.C. § 1255(a).

According to statute, "[a]liens who qualify, through random selection, for a visa under [the diversity visa program] shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected." 8 U.S.C. § 1154(a)(1)(I)(ii)(II). The State Department has promulgated regulatory provisions that automatically revoke diversity visa petitions and prevent the issuance of visas and the allotment of visa numbers after midnight of the final day of the relevant fiscal year. *See* 22 C.F.R. § 42.33(a)(1) ("The eligibility for a visa . . . ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility."); 22 C.F.R. § 42.33(e) ("A petition . . . shall be valid until Midnight of the last day of the fiscal year for which the petition was submitted. At that time, the petition is automatically revoked . . . and no diversity visa numbers can be allotted after that date."); 22 C.F.R. § 42.33(g) (Diversity immigrant visa numbers "shall be allotted only during the fiscal year for which a petition to accord diversity immigrant status was

submitted and approved. Under no circumstances shall immigrant visa numbers be allotted after Midnight of the last day of the fiscal year for which the petition was submitted and approved.").

2. Nyaga's and Kibarra's Applications for Adjustment of Status

Nyaga, a native of Kenya, entered the United States in May 1996 on a student visa. In July 1996, Kibarra, Nyaga's wife, entered the United States on a visitor visa. Nyaga filed a petition in February or March 1997 to enter the Fiscal Year 1998[2] Diversity Visa Program lottery. In a letter dated July 1, 1997, Nyaga was notified that he had been selected as a lottery winner. The letter informed him that 100,000 petitions had been selected for further processing, and that only 55,000 diversity visas were available under the Fiscal Year 1998 Diversity Visa Program. Nyaga was also informed, in a subsequent letter, that the INS would not accept applications to adjust status based on the Fiscal Year 1998 Diversity Visa Program until October 1, 1997, the first day of fiscal year 1998.

In October 1997, Nyaga submitted an application to adjust his status. Kibarra simultaneously submitted a derivative application to adjust her status based on her husband's eligibility to receive a diversity visa. Although Nyaga's and Kibarra's applications for adjustment of status were submitted in October 1997, their applications were not complete until the INS received their processing fees on

2. Fiscal year 1998 began on October 1, 1997, and ended at midnight on September 30, 1998.

February 2, 1998. After an applicant has submitted a complete application, other agencies assist with a background investigation that includes an FBI fingerprint check, a CIA name check, and a records check with the Bureau of Consular Affairs in the applicant's native country. On February 20, 1998, the INS forwarded Nyaga's and Kibarra's fingerprint cards to the FBI. The INS took no further action to process Nyaga's or Kibarra's adjustment applications before September 30, 1998, the final day of fiscal year 1998.

Under the Fiscal Year 1998 Diversity Visa Program, 97,319 applicants were designated as lottery winners eligible to receive a visa and 55,000 diversity visas were available. Only 51,565 diversity visas were actually issued under the program; almost 3,500 authorized diversity visas were not issued. Neither Nyaga's nor Kibarra's adjustment applications were processed before the end of fiscal year 1998, and neither Nyaga nor Kibarra received a visa.

From February 1998, when their applications were completed, until September 30, 1998, the end of the fiscal year, Nyaga and Kibarra did not formally inquire regarding the status of their applications because they were advised that they should not make such inquiries.[3] During fiscal year

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3. When Nyaga received the adjustment of status application forms, he also received a cover letter that instructed: "While your application is pending before the interview, please DO NOT make inquiry as to the status of your case, since it will result in further delay." (R.1-1 Ex. G at 1.) Moreover, the Plaintiffs allege that the Atlanta District Office of the INS instituted a policy that prevented direct contact with the INS and that a prominent sign in the Atlanta District Office directs anyone with an inquiry to leave the INS building because person-to-person inquiries were not permitted.

1998, Nyaga attended at least two work authorization interviews, and he claims that he informally inquired about the status of his adjustment application during these interviews and was told that there was nothing he could do but wait. The INS does not have any record of these conversations.

On January 23, 2001, almost three years after their applications were completed, the INS interviewed Kibarra regarding her adjustment application. The INS denied Kibarra's application on February 28, 2001, on the grounds that Kibarra's derivative application was based on Nyaga's eligibility for a diversity visa and Nyaga was no longer eligible to receive a visa because fiscal year 1998 had ended. The INS did not issue a final decision on Nyaga's application before the Plaintiffs filed the complaint in this case.

II. PROCEDURAL HISTORY

On May 15, 2001, Nyaga and Kibarra filed a complaint in the district court against Ashcroft and Melville, seeking to compel the Defendants to process Nyaga's application for adjustment of status under the Fiscal Year 1998 Diversity Visa Program and to grant Nyaga and Kibarra legal permanent resident status. The Plaintiffs assert jurisdiction under 28 U.S.C. § 1361 (mandamus jurisdiction), 28 U.S.C. § 1331 (federal question jurisdiction), 8 U.S.C. § 1329 (the Immigration and Nationality Act), and 5 U.S.C. § 704 (the Administrative Procedure Act). They allege that: (1) Melville is obligated to issue documents and take all necessary action to process Nyaga's application under the Fiscal Year 1998 Diversity Visa Program; (2) Melville lacks

the authority to deprive the Plaintiffs of legal permanent resident status after the Plaintiffs submitted all necessary information and fees no later than February 2, 1998; and (3) the processing of Nyaga's application for adjustment of status is a purely ministerial, non-discretionary act which Melville was obligated to complete in a timely manner. Nyaga and Kibarra asked the district court to compel the Defendants to process Nyaga's application to adjust status[4] and declare that there are no just grounds to suspend the issuance of permanent residency documents to Nyaga and Kibarra.

The Defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim and asked the district court, in the alternative, to consider the motion as a motion for summary judgment. The Plaintiffs opposed the Defendants' motion and filed a cross-motion for summary judgment. The district court denied the Defendants' motion and granted the Plaintiffs' motion. The district court concluded that 8 U.S.C. § 1252 did not preclude the court from exercising jurisdiction, and further concluded that it could exercise mandamus jurisdiction under 28 U.S.C. § 1361. *Nyaga v. Ashcroft,* 186 F. Supp. 2d 1244, 1252-54 (N.D. Ga. 2002). Mandamus is

4. On the same day that the complaint was filed, the Plaintiffs also filed an emergency motion for a preliminary injunction. The motion sought, in part, to prohibit the INS from summarily denying Nyaga's adjustment application during the pendency of the litigation. The Defendants agreed that they would not take any action in connection with Nyaga's adjustment application until the district court issued a final ruling, and the court issued a consent order to that effect. Accordingly, the INS has not taken any action on Nyaga's application.

proper if (1) the Plaintiffs can show a clear right to the relief sought; (2) the Defendants have a clear, non-discretionary duty to act; and (3) no other remedy is available. *Heckler v. Ringer,* 466 U.S. 602, 617, 104 S. Ct. 2013, 2022 (1984). In reaching its conclusion, the court held that (1) Nyaga "has a right for the visa application to be processed and a final, thorough decision made"; (2) the INS "has a non-discretionary duty to make diligent efforts in furtherance of adjudicating diversity visa applications"; and (3) the Plaintiffs had no alternative remedy to mandamus. *Nyaga,* 186 F. Supp. 2d at 1253-54.

The court then examined the merits of the case and concluded that there were no genuine issues of material fact. *Id.* at 1254. Having already ruled that Nyaga had a right to adjudication of his application, the court devoted its attention to the "hotly contested" issue of whether the court could provide a meaningful remedy. *Id.* Although the Defendants contended that the INS and the Attorney General lack the authority to issue a visa to Nyaga or Kibarra because fiscal year 1998 has ended, the court concluded that 8 U.S.C. § 1154(a)(1)(I)(ii)(II) did not plainly prohibit the INS from processing Nyaga's application. *Id.* at 1255. Because the statute did not plainly prohibit the adjudication of Nyaga's application, the court turned to congressional intent and concluded that "Congress could not have intended for aliens to lose their eligibility to be considered for diversity visas due solely to government inaction." *Id.* at 1256. Although the court acknowledged that the State Department's regulations "come close to providing explicitly that the Government does not have the power to issue visas after the end of the fiscal year," the court concluded that "the central

inquiry" in the regulations is whether Nyaga "is still eligible for the visa," and that "Nyaga effectively retains his eligibility because the Government did not diligently act to process the visa." *Id.* at 1256 n.13.

In granting the Plaintiffs' motion for summary judgment, the court ordered the Defendants to adjudicate Nyaga's diversity visa application as if fiscal year 1998 had not ended. *Id.* at 1256-57 ("The court hereby orders Defendants to conduct a thorough review of Charles Nyaga's diversity visa application and application to adjust status on the merits as if fiscal year 1998 had not yet expired."). The court acknowledged that it lacked the jurisdiction to order the Defendants to issue diversity visas to the Plaintiffs; it could order the INS to adjudicate Nyaga's application but it could not mandate a certain outcome in that adjudication. *Id.* at 1253, 1256. The Defendants appeal.

III. ISSUES ON APPEAL

We are presented with three issues on appeal: (1) whether the Plaintiffs' claim is moot; (2) whether the district court had subject matter jurisdiction to consider Plaintiffs' claim; and (3) whether the district court properly concluded that there were no genuine issues of material fact and that the Plaintiffs were entitled to judgment as a matter of law. Because we conclude that the Plaintiffs' claim is moot, however, we do not address any other issues.

IV. STANDARD OF REVIEW

We review questions of mootness under a plenary standard of review. *Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 496 (11th Cir. 1996).

V. CONTENTIONS OF THE PARTIES

The Defendants contend that the district court erred when it concluded that the court was capable of providing meaningful relief to the Plaintiffs.[5] The Defendants argue that the plain language of 8 U.S.C. § 1154(a)(1)(I)(ii)(II), when read in conjunction with 8 U.S.C. § 1255(a), compels the conclusion that Nyaga is no longer eligible to receive a diversity visa because fiscal year 1998 has ended, and thus he cannot satisfy the statutory requirements for adjustment of status under § 1255(a). The Defendants further contend that congressional intent, reflected in Congress's prior efforts in passing ameliorative legislation related to the diversity visa program, evinces the clear understanding that Nyaga is no longer eligible to receive a diversity visa. Moreover, the Defendants argue that even if the statute is ambiguous, the State Department has issued reasonable regulations that interpret the statute in a manner that renders Nyaga no longer eligible to receive a visa and this interpretation is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S. Ct. 2778 (1984). On these grounds, the Defendants contend that the court is unable to accord meaningful relief to the Plaintiffs because,

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5. Because we decide this case on mootness grounds, we limit our discussion to the parties' contentions related to this issue.

even if Nyaga's application to adjust status is processed, the Attorney General lacks the authority under § 1255(a) to adjust Nyaga's status because Nyaga is no longer eligible to receive a visa.

The Plaintiffs argue that if the INS processes Nyaga's application and concludes that Nyaga meets the education and background check requirements, Nyaga would be eligible to receive a visa. The Plaintiffs contend that the plain meaning of § 1154(a)(1)(I)(ii)(II), when interpreted in the context of the entire diversity visa program statute, *does not* establish that a lottery winner is no longer eligible to receive a visa after the relevant fiscal year ends; in Plaintiffs' view, the statute establishes that a lottery winner must *submit a complete application* by the end of the fiscal year. The Plaintiffs also contend that congressional intent supports their interpretation, arguing that Congress intended that the INS process all applications and that Congress could not have intended for a lottery winner to become ineligible for a visa due solely to the INS's inaction. The Plaintiffs argue that the State Department's interpretation of § 1154(a)(1)(I)(ii)(II) is unreasonable and not entitled to *Chevron* deference because it is inconsistent with specific provisions of the diversity visa statute. Lastly, the Plaintiffs contend that, in prior years, the INS has instructed applicants to appear to obtain a visa even after the applicable fiscal year has ended. Accordingly, the Plaintiffs argue that Nyaga remains eligible to receive a diversity visa, and as a consequence, the case is not moot because this court is capable of providing meaningful relief.

Appendix A

VI. DISCUSSION

Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" or "Controversies." U.S. Const. art. III, § 2. The "case or controversy" requirement imposes justiciability limitations on federal courts, and these limitations include mootness. *See Soliman v. United States ex rel. INS,* 296 F.3d 1237, 1242 (11th Cir. 2002). The doctrine of mootness is derived from Article III's "case or controversy" requirement because "an action that is moot cannot be characterized as an active case or controversy." *Adler v. Duval County Sch. Bd.,* 112 F.3d 1475, 1477 (11th Cir. 1997). The question of mootness is a threshold inquiry in every case; as the Supreme Court has noted, "the question of mootness is . . . one which a federal court must resolve before it assumes jurisdiction." *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S. Ct. 402, 404 (1971). If the district court is presented with a moot case, the case must be dismissed because any decision on the merits would constitute an impermissible advisory opinion. *Al Najjar v. Ashcroft,* 273 F.3d 1330, 1336 (11th Cir. 2001); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.,* 225 F.3d 1208, 1217 (11th Cir. 2000).

A district court lacks the power, on mootness grounds, to decide a case if its decision cannot affect the rights of the litigants in the case. *Rice,* 404 U.S. at 246, 92 S. Ct. at 404; *see also Powell v. McCormack,* 395 U.S. 486, 496, 89 S. Ct. 1944, 1951 (1969) ("[A] case is moot when . . . the parties lack a legally cognizable interest in the outcome."). This court has concluded that a case must be dismissed as moot if the court can no longer provide "meaningful relief." *Fla. Ass'n*

of Rehab. Facilities, 225 F.3d at 1216-17. Before we can address the merits of this case, we must determine whether the district court could give meaningful relief to Nyaga and Kibarra.

The Plaintiffs requested two types of relief: (1) to "[c]ompel Defendants and those acting under them to immediately perform their legal duty to complete all remaining process of Plaintiff, Charles Kibaara Nyaga's, Adjustment of Status" and (2) to "[d]eclare that there are no just grounds to suspend issuance of all appropriate permanent residency documents to both Plaintiffs."[6] (R.1-1 at 15.) We view the first request for relief (that the INS process Nyaga's application) as merely a means to the second request for relief (that the Attorney General adjust Nyaga's status and Kibarra's status to that of lawful permanent residents). If Nyaga is no longer eligible to receive a diversity visa, we conclude that an order requiring the INS to process his application on the merits—only to have their adjustment applications denied by the Attorney General because Nyaga does not meet the "eligible to receive an immigrant visa" requirement of § 1255(a)—would not constitute meaningful relief. Accordingly, the question of whether the district court

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6. We acknowledge that, with respect to Kibarra, this request presents (1) a potential jurisdictional problem under 8 U.S.C. § 1252(a)(2)(B)(i) because Kibarra's derivative adjustment application was denied in 2001 and (2) a pragmatic concern because she does not have a pending application that could be granted under § 1255(a). Nonetheless, we do not address these issues because we conclude that Nyaga is not eligible to receive a visa. Because he is not eligible to receive a visa, it necessarily follows that Kibarra is not eligible to receive a visa as his spouse.

could provide meaningful relief to the Plaintiffs reduces to a single inquiry: would Nyaga be "eligible to receive an immigrant visa" if the INS were to process his application on the merits and conclude that he would otherwise be admissible for legal permanent residence?

To answer this question, we must interpret the diversity visa statute, and our analysis begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438, 119 S. Ct. 755, 760 (1999). "[U]nless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language." *Coggin Automotive Corp. v. Comm'r of Internal Revenue,* 292 F.3d 1326, 1332 (11th Cir. 2002). When we examine the meaning of statutory words or phrases, however, we cannot examine statutory provisions in isolation. *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132, 120 S. Ct. 1291, 1300-01 (2000). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treas.,* 489 U.S. 803, 809, 109 S. Ct. 1500, 1504, (1989).

Nyaga and Kibarra have asked the Attorney General to adjust their status to that of a lawful permanent resident pursuant to 8 U.S.C. § 1255(a). Section 1255(a) states:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent

> residence if (1) the alien makes an application for such adjustment, (2) the alien is *eligible to receive an immigrant visa* and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a) (emphasis added). According to § 1255(a), the Attorney General may adjust Nyaga's status only if Nyaga is "eligible to receive an immigrant visa." But 8 U.S.C. § 1154(a)(1)(I)(ii)(II), a provision that relates to the procedures for filing petitions pursuant to the diversity visa program, states in full:

> Aliens who qualify, through random selection, for a visa under section 1153(c) of this title [the diversity visa program] *shall remain eligible to receive such visa* only through the end of the specific fiscal year for which they were selected.

8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added). If this section, when properly interpreted, means that Nyaga is no longer eligible to receive an immigrant visa because fiscal year 1998 has ended, then the Attorney General lacks the power to adjust Nyaga's status under § 1255(a). Therefore, the resolution of the mootness issue hinges upon this court's interpretation of the phrase "shall remain eligible to receive such visa" in § 1154(a)(1)(I)(ii)(II).

We agree with the Defendants that the phrase "shall remain eligible to receive such visa" plainly means that aliens, like Nyaga, who have been randomly selected to

qualify for a visa under the diversity visa program cannot be issued a visa after midnight of the final day of the fiscal year for which they were selected. As of midnight on September 30, 1998, Nyaga was no longer eligible to receive an immigrant visa. The INS's failure to process Nyaga's application does not extend Nyaga's statutorily-limited period of eligibility for a diversity visa. "Eligible to receive such visa" is unambiguous, and because the phrase is unambiguous, our inquiry must end with the statute's plain language. In reaching this conclusion based on the statute's plain meaning, we are not alone. *See Iddir v. INS,* 301 F.3d 492, 500-01 (7th Cir. 2002) (concluding that even if the INS were to adjudicate applications after the fiscal year ended, visas could not be issued); *id.* at 502 (Flaum, J., concurring) (concluding that the plaintiffs are no longer eligible to receive visas); *Fornalik v. Perryman,* 223 F.3d 523, 526 (7th Cir. 2000); *Vladagina v. Ashcroft,* unpublished at __ (S.D.N.Y. Apr. 8, 2002); *Iddir v. INS,* 166 F. Supp. 2d 1250, 1259 (N.D. Ill. 2001) (holding that "[t]he end of fiscal year 1998 was September 30, 1998, which means that plaintiffs are no longer eligible to receive visas"), *aff'd on other grounds,* 301 F.3d 492 (7th Cir. 2002); *Zapata v. INS,* 93 F. Supp. 2d 355, 358 (S.D.N.Y. 2000) ("The plain meaning of § 1154 is that after the fiscal year has ended on September 30, no diversity visas may be issued *nunc pro tunc* based on the results of the previous fiscal year's visa lottery."); *Diallo v. Reno,* 61 F. Supp. 2d 1361, 1368 (N.D. Ga. 1999).[7]

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7. The Plaintiffs cite cases that, while arguably distinguishable from this case, could be read to support the proposition that the INS can issue visas after the fiscal year has ended. *Paunescu v. INS,* 76 F. Supp. 2d 896, 903 (N.D.Ill.1999); *Marcetic v. INS,* unpublished at __ (N.D.Ill. Apr. 6, 1998).

The Plaintiffs contend that when the phrase "shall remain eligible to receive such visa" is construed in light of its context, the phrase actually means "shall remain eligible *to apply for* such visa." The Plaintiffs rely on the fact that § 1154(a)(1)(I)(ii)(II) sets forth the procedure for applying for a diversity visa; the Plaintiffs contend that when this section is read as a whole, it is clear that a lottery winner "has until the end of the fiscal year to be eligible to apply for such visa." (Pls.' Br. at 29.) We disagree. Although § 1154(a)(1)(I) establishes the procedure for submitting a diversity visa petition, there is nothing in this section, when read in its entirety, that leads us to believe that the phrase "shall remain eligible to receive such visa" actually means "shall remain eligible to apply for such visa." Although the Plaintiffs argue that this section necessarily was intended to establish a deadline for submitting a visa application, we believe that it is just as likely that Congress intended to place an ultimate deadline on visa eligibility in order to bring closure to each fiscal year's diversity visa program. We conclude that even when the phrase "shall remain eligible to receive such visa" is read within the context of the entire procedural framework established in § 1154(a)(1)(I), the plain meaning of "shall remain eligible to receive such visa" does not change, nor is it rendered ambiguous.[8]

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8. The Plaintiffs also argue that our interpretation of § 1154(a)(1)(I)(ii)(II) undermines Congress's intent. The Plaintiffs present three arguments related to congressional intent: (1) Congress could not have intended for an alien to lose visa eligibility due solely to the INS's inaction; (2) Congress authorized the Secretary of State to establish a processing fee that will allow the State Department to recover the costs of processing *all* diversity visa applications; and (Cont'd)

Appendix A

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(3) Congress's enactment of § 1153(c)(1)(E)(iv), which permits the redistribution of visa numbers among regions, reflects Congress's intent that all 55,000 available visas be issued.

While we rest our decision upon the plain meaning of § 1154(a)(1)(I)(ii)(II), it is not at all clear that our understanding of the plain meaning of the statute undermines Congress's intent. As we noted above, § 1154(a)(1)(I)(ii)(II) brings closure to each fiscal year's diversity visa program by declaring that lottery winners are no longer eligible to receive a visa after midnight on the last day of the fiscal year for which they were selected. Even if Congress intended for all applications to be processed and all authorized visas to be issued, and even if Congress did not intend for lottery winners to lose their eligibility due to the INS's inaction, it does not necessarily follow that Congress did not intend to establish an ultimate deadline for the issuance of visas under each fiscal year's diversity visa program.

Congress's prior legislative enactments related to the diversity visa program demonstrate that our understanding of the statute's plain meaning conforms to Congress's understanding of the statute. In 1996, Congress passed legislation which permitted Fiscal Year 1995 Diversity Visa Program applicants from Poland to receive diversity visas from the fiscal year 1997 visa numbers. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 637, Pub.L. 104-208, 110 Stat. 3009. In 1998, Congress enacted ameliorative legislation that authorized Fiscal Year 1998 Diversity Visa Program applicants from Kenya and Tanzania (whose visa interviews could not be conducted on time because the United States embassy in Kenya had been bombed) to receive visas from the fiscal year 1999 visa numbers. Act of November 10, 1998, § 1, Pub.L. 105-360, 112 Stat. 3276. While neither situation involved the INS's failure to process a lottery winner's application, this distinction is irrelevant; Congress's action clearly evinces its understanding that

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Because we conclude that Nyaga is no longer eligible to receive a visa, the district court could not provide meaningful relief to the Plaintiffs and the court was compelled to dismiss this case as moot. In instructing the district court to dismiss on mootness grounds, we join several other courts that have addressed similar cases. *Vladagina,* unpublished at __ (S.D.N.Y. Apr. 8, 2002); *Iddir,* 166 F. Supp. 2d at 1260 (concluding that the case should be dismissed as moot because "[a]ny order by this court compelling the INS to adjudicate plaintiffs' applications would be a futile act"); *Zapata,* 93 F. Supp. 2d at 358 (concluding that the court could not provide effectual relief to the plaintiffs because fiscal year 1998 had ended and fiscal year 1998 visas could not be issued "to anyone"); *see also Iddir,* 301 F.3d at 502 (Flaum, J., concurring) (departing from the majority and stating that the case is moot because "it is the INS's lack of *power* to grant effectual relief—not its lack of *duty*—that makes the claims nonjusticiable").[9]

(Cont'd)
an applicant is no longer eligible to receive a visa, absent legislative action, after the relevant fiscal year has ended even if there are unissued visa numbers remaining from the relevant fiscal year.

Additionally, because we conclude that the statute's plain meaning is clear, we need not address the Defendants' argument that we must accord *Chevron* deference to State Department regulations that interpret § 1154(a)(1)(I)(ii)(II) in a manner that renders applicants no longer eligible to receive visas after the applicable fiscal year has ended.

9. Nyaga and Kibarra may once again submit petitions to enter the diversity visa program lottery with the hopes that one of them
(Cont'd)

VII. CONCLUSION

The plain meaning of 8 U.S.C. § 1154(a)(1)(I)(ii)(II) establishes that Nyaga's eligibility for a diversity visa expired at midnight on September 30, 1998. Therefore, Nyaga is not "eligible to receive an immigrant visa" and the Attorney General lacks the authority to adjust Nyaga's status to that of a lawful permanent resident under § 1255(a). As a consequence, the district court could not provide meaningful relief to the Plaintiffs, and should have dismissed the action as moot. We vacate the district court's order and remand the action with instructions that the district court dismiss the action as moot.

VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS AS MOOT.

(Cont'd)

will be selected and that this time, unlike the last, the Defendants will process and adjudicate their applications before the fiscal year ends. They may also petition Congress for a private bill of relief. *See, e.g.*, H.R. 509, 108th Cong. (2003) ("For the relief of Lindita Idrizi Heath"); H.R. 392, 108th Cong. (2003) ("For the relief of Natasha Oligovna Russo and Anya Oligovna").

Appendix A

BARKETT, Circuit Judge, dissenting:

I would affirm the district court's grant of mandamus ordering the Immigration and Naturalization Service ("INS") to do that which was required of it by Congress: process Nyaga's application for a diversity immigrant visa. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 (11th Cir. 1998) (*en banc*) (recognizing that the writ of mandamus is an appropriate remedy to correct the failure to carry out a ministerial task) (citing *In re Estelle,* 516 F.2d 480, 483 (5th Cir. 1975)).[1] The INS takes the position that it is free to completely disregard a Congressional directive. This view is problematic in the abstract, to say the least, but in this case the INS' stance renders nugatory an entire section of the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1153(c).

Section 1153(c) of the INA is comprised of three subsections that, together, establish the diversity immigrant visa program. As the majority notes, the diversity visa program is designed to provide permanent residence visas to individuals from countries with historically low rates of immigration to the United States. In the first subsection of § 1153(c), entitled "In General," Congress details the bulk of the program.[2] *See id.* In the introductory paragraph to

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1. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

2. The other two subsections of § 1153 are short, and of little relevance to Nyaga's claims. Specifically, § 1153(c)(2) is an eligibility (Cont'd)

§ 1153(c)(1), Congress states that "[e]xcept as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants *shall be allotted visas each fiscal year* as follows. . . ." *Id.* (emphasis added).

Although the Department of State generally administers the diversity visa program, the INS is responsible for adjudicating and issuing diversity visas to applicants who reside in the United States at the time of their selection. Once an alien receives notice of his selection in the diversity visa program, he is eligible to apply for an adjustment to permanent resident status.[3] *See* 8 U.S.C. § 1255. To receive a status adjustment, the alien must meet three criteria: 1) the applicant must apply for the adjustment; 2) the applicant must be statutorily eligible for the adjustment; and 3) the INS must have a visa number available when the alien's application is approved. *See* § 1255(a). While the ultimate decision whether to adjust an alien's status is discretionary, diversity visa applicants who are selected to participate in the program (the "lottery winners") satisfy

(Cont'd)
provision that dictates aliens must have at least a high school education and two years of work experience "in an occupation which requires at least two years of training" in order to receive a visa. § 1153(c)(2). Section 1153(c)(3) dictates that the Secretary of State maintain information on all immigrants issued visas. *See* § 1153(c)(3).

3. An "adjustment of status" is a procedure for becoming an "alien lawfully admitted for permanent residence." *See* 8 U.S.C. § 1255(a). It allows resident aliens to remain in the United States during the application process rather than requiring them to leave the country in order to apply.

§ 1255(a)'s criteria simply by applying for the adjustment and meeting § 1153(c)'s eligibility requirements. And, as the INS concedes in its brief, an otherwise eligible immigrant[4] who has complied with these requirements would ordinarily face no impediment to a status adjustment, save the possibility that all of the available visas under the diversity program had already been issued to other applicants.

Throughout § 1153(c)(1) Congress chose to employ authoritative language that affirmatively directs action. The term "shall" pervades § 1153(c). In addition to its use in the introductory phrase "diversity immigrants shall be allotted visas," § 1153(c)(1), Congress repeated the term eleven times in § 1153(c), stating that the INS, the Attorney General, or the Secretary of State "shall" perform certain functions. *See* § 1153(c)(1)(A) ("[t]he Attorney General *shall* determine"), (B)(i) ("[t]he Attorney General *shall* identify"), (B)(ii) ("[t]he Attorney General *shall* identify"), (C) ("[t]he Attorney General *shall* determine"), (D) ("[t]he Attorney General *shall* determine"), (E)(iv) ("excess visa numbers *shall* be made available") (emphases added).

Section 1153(c) also contains clear language directing the INS to distribute all available diversity immigrant visas for a given fiscal year. Most notably, § 1153(c)(1)(E)(iv) gives the Secretary of State the following command:

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4. As part of the application process, the INS must also interview the applicant and conduct a complete background investigation, including an FBI fingerprint check, a CIA name check, and a records check through the Bureau of Consular Affairs in the applicant's native country *See* 22 C.F.R. § 42.67; *Iddir v. INS,* 166 F. Supp. 2d 1250, 1253 (N.D. Ill. 2001).

> If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the *excess visa numbers shall be made available* to natives (other than natives of a high-admission state) of the other regions in proportion to the percentages otherwise specified in clauses (ii) and (iii).

§ 1153(c)(1)(E)(iv) (emphasis added). By its plain language, § 1153(c)(1)(E)(iv) directs the Secretary of State (and the INS in the course of processing adjustment of status applications) to distribute all available diversity immigrant visas each year. *See id.* If the Secretary determines that the immigrant visas allocated to one region will not be fully distributed, then those visas must be made available to applicants from other regions. *See id.* Section 1153(c)(1)(E)(iv)'s clear mandate is that all of the diversity immigrant visas that Congress sets aside be distributed to eligible applicants (i.e. applicants who satisfy § 1153(c)(2)).

Each year the Department of State receives several million applications for the diversity immigrant visa program. In 1997, Nyaga was one of these applicants and on July 1, 1997, he received notification of his selection as one of the 100,000 lucky "winners" chosen to participate in the program.[5] This notification letter made it clear that Nyaga

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5. The common reference to aliens selected to apply for an immigrant visa under the diversity program as "lottery winners" is something of a misnomer: in reality the alien simply becomes eligible

(Cont'd)

was not automatically entitled to a visa, but did indicate that he was among the "100,000 DV-98 entries [that] were randomly selected" to apply for one of the 55,000 available visas. The letter also instructed Nyaga of the necessary forms that he must file with the National Visa Center[6] and cautioned him to "carefully follow these instructions to increase your chances of possible visa issuance." A subsequent letter dated September 26, 1997, informed Nyaga that "the 1998 Diversity Lottery Program requires a $75.00 diversity visa processing fee, per person."[7] This letter notified Nyaga that, as an applicant residing in the United States, he must also apply for an "adjustment of status" directly with the INS, which he did. The INS' "adjustment of status" application required Nyaga to complete several forms, attach numerous supporting documents "including pictures and [a] medical examination report," and pay a fee of "$130.00 for applicants 14 years of age or older and $100.00 for applicants under the age of 14."[8]

(Cont'd)
to apply for a permanent visa under the program. "Winning" aliens do not necessarily receive a visa. Typically, the INS selects around 100,000 "winners" for the 55,000 visas that are available each year. *See* 8 U.S.C. § 1151(e). The INS uses this system because it has found that only around one-half of the aliens selected to apply for diversity visas are both qualified to receive the visa and actually file an application. *See Diallo v. Reno,* 61 F. Supp. 2d 1361, 1363 n.3 (N.D. Ga. 1999).

6. The National Visa Center was established and is directed by the Department of State.

7. Nyaga paid an application fee of $300.00.

8. Nyaga's application included a payment to the INS of $1,200.00 which included a $130.00 filing fee for his adjustment of status application (I-485), a $1,000.00 "other fee," and a $70.00 fee for his employment authorization application (I-765).

It is not disputed that Nyaga properly completed both the diversity visa application and the "adjustment of status" application on or before February 2, 1998. This left the INS just under eight full months to adjudicate his petition before the end of fiscal year 1998. However, other than forwarding his fingerprint cards to the FBI on February 20, 1998, the INS did not act upon Nyaga's petition prior to the end of the fiscal year.[9] Nyaga now quite reasonably argues that, at the very least, his timely completion of the diversity visa program's procedural and fiscal requirements should have entitled him to an equally timely adjudication of his application. According to the INS, this is not so.

Incredibly, the INS relies upon its own inaction during fiscal year 1998 as the justification for its current impotence to issue Nyaga a visa. Since under 8 U.S.C. § 1154(a)(1)(I)(ii)(II) eligibility for the diversity program is limited to the fiscal year in which the alien was selected to participate, the INS argues that its failure to act upon Nyaga's application during the 1998 fiscal year renders him statutorily ineligible to receive a diversity visa.[10] *See* § 1154(a)(1)(I)(ii)(II). To be clear, the INS failed to adjudicate Nyaga's application during the fiscal year in which he applied and, based on this failure, now contends that

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9. This failure by the INS to act was not due to the unavailability of diversity visas that year. When the fiscal year 1998 ended, more than 3,000 diversity visas were left undistributed.

10. The INS generously points out that though ineligible for a 1998 diversity visa, Nyaga can reapply to the program each year. As Nyaga must literally "win the lottery" to regain his eligibility, this is hardly a constructive suggestion.

Nyaga is no longer eligible for a 1998 diversity visa. The majority reluctantly accepts this argument and, as a consequence, deems Nyaga's claim for relief moot under § 1154(a)(1)(I)(ii)(II).

I question the propriety of this judgment because, under the majority's reading of the statute, Nyaga faces an intractable conundrum. Nyaga was rendered technically ineligible for relief under § 1154(a)(1)(I)(ii)(II), not due to any error of his own, but rather as the result of the INS' unilateral failure to comply with the directives of the INA. Such a result is particularly offensive because it is clear from the statute that Congress expected the INS to perform the ministerial duties required by the program (i.e. to assure the distribution of the allotted visas) and, thus, under § 1153(c), Nyaga was entitled to have the INS adjudicate his timely-filed diversity visa application.[11] *See Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002); *Paunescu v. INS*, 76 F. Supp. 2d 896, 900 (N.D. Ill. 1999).

Because, in my view, § 1153(c) of the INA requires the INS to act on diversity visa applications, I believe the district court properly found that mandamus is the appropriate remedy to compel the INS to perform its ministerial role under the INA and adjudicate Nyaga's application. *See Armstrong*, 138 F.3d at 1378.

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11. The INS all but concedes this point in its brief, stating that "Nyaga is arguably entitled to an adjudication of his diversity visa based adjustment application." INS Br. p. 29.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED FEBRUARY 20, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:01-CV-1249-ODE

CHARLES KIBAARA; NYAGA and
DOIN KAINYU KIBARRA,

Plaintiffs

v.

JOHN ASHCROFT, As Attorney General of the United States; and ROSEMARY LANGLEY MELVILLE, as District Director, Atlanta Division of the Immigration and Naturalization Service,

Defendants

ORDER

This civil immigration case is presently before the court on Defendants' Motion to Dismiss or in the alternative for Summary Judgment and Plaintiffs' cross motion for summary judgment. Plaintiffs seek mandamus relief, pursuant to 28 U.S.C. § 1361, in the form of an order compelling Defendants immediately to "perform their legal duty to complete all remaining process of Plaintiff Charles Kibaara Nyaga's

Adjustment of Status." (P1. Compl. at 15]. For the reasons set forth below, Defendants' motion is DENIED and Plaintiffs' motion for summary judgment is GRANTED.

In the instant matter, Charles Nygaga, a citizen of Kenya, was selected to participate in the 1998 Diversity Visa Lottery Program, which permits aliens from under-represented areas of the world to apply for immigrant visas. 8 U.S.C. § 1153 (c) (1) (A). As he already resided in the United States, he applied for an Adjustment of Status pursuant to the Diversity Program, through which he could attain legal permanent residency. 8 U.S.C. § 1154. *Diversity Visa Lottery Program*

Section 203 of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1153 (c) (1)(A), constitutes the relevant statute governing the Diversity Visa Program. That statute requires the Attorney General to determine "for the most recent previous 5-fiscal-year period for which data are available," the total number of aliens by country of origin who were admitted to the United States or granted lawful permanent residency under the worldwide quota system in 8 U.S.C. § 1151 (a) or as immediate relatives under 8 U.S.C. § 1151(b) (2). On the basis of these numbers, the Attorney General must divide 55,000 lottery visa openings among "low-admission regions." This provision was designed to enhance immigration from under-represented countries.

An alien from a "low-admission region" who otherwise meets the program's qualifications may apply once yearly to the Department of State to register for a diversity visa. Based upon the Attorney General's regional allocations for a given year, "[i]mmigrant visa numbers made available [under the

diversity program] shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State." 8 U.S.C. § 1153 (e)(2). The program has been described as a "visa lottery" because of the random order of the State Department's assignment of visa eligibility. The relevant regulation refers to the application to be considered eligible to participate in the diversity visa "'lottery" as a petition. 22 C.F.R. § 42.33(b).

Because the INS selects approximately 100,000 "winners" in each lottery, not every visa applicant actually receives a visa. Once an individual "wins" the lottery, and becomes eligible for consideration in, the diversity visa program, the alien must then file an immigrant visa application.[1] *See* 22 C.F.R. § 42.33 (h); Notices, Department of State Bureau of Consular Affairs; Registration for the Diversity Immigrant (DV-98) Visa Program, 61 Fed. Reg. 58730 (Nov. 18, 1996). This diversity visa application is the application upon which the decision whether or not to grant the immigrant visa is based, and lottery winners are encouraged to file quickly. *See* Notices, Department of State Bureau of Consular Affairs; Registration for the Diversity Immigrant (DV-98) Visa Program, 61 Fed. Reg. 58730 (Nov. 18, 1996). In reviewing the diversity visa application, the Government is required to conduct a background check, including an FBI fingerprint check, a CIA name check and a records check.

Under the laws and regulations implementing the Diversity Immigrant Visa program, a person who: presently

1. The regulations describe this as approval of the diversity visa petition. 22 C.F.R. § 42.33.

resides in the United States, is selected, and then submits a fee may receive an adjustment of status to permanent resident provided that (1) the applicant applies for adjustment, (2) the applicant is statutorily eligible for adjustment and (3) a visa number is available at the time that person's application is approved. *See* 8 U.S.C. § 1255(a). In addition; a spouse of a diversity lottery winner may also apply derivatively to adjust status, without impacting the number of diversity visas available to other lottery winners. 8 U.S.C. § 1153(d). A grant of adjustment of status is discretionary, even if an applicant satisfies the three requirements for eligibility. Because of the special benefit it confers upon an alien who would otherwise be required to depart the United States to apply for an immigrant visa, and then return, section 245 adjustment is considered to be "extraordinary relief." *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988).

The 1998 Diversity Visa program ran during fiscal year 1998, *i.e.*, October 1, 1997 to September 30, 1998. In the 1998 program, 55,000 diversity visas were available, of which approximately 51,000 were issued.

Plaintiffs and the 1998 Diversity Visa Program

Plaintiff Charles Nyaga ("Nyaga" or "Plaintiff Nyaga") is a citizen of Kenya who entered the United States in May 1996 as a student at Chattahoochee Technical College in Marietta Georgia

He graduated in June 1999. Plaintiff Doin Kibaara ("Kibaara" or "Plaintiff Kibaara"), Plaintiff Nyaga's wife, entered the United States on July 17, 1996 on a visitor visa.

Appendix B

On July 1, 1997, Plaintiff Nyaga was notified that he was one of 100,000 individuals selected to participate in the fiscal year 1998 diversity visa program, and was directed to submit an application for the visa and apply to adjust status. Nyaga submitted his status adjustment application in October, 1997, and provided all required documentation and information, including the processing fee, to the Immigration and Naturalization Service ("INS") by February 2, 1998, seven months before the end of fiscal year 1998. Contemporaneously, Kibaara submitted a derivative application to adjust status as Nyaga's wife.[2] Because Kibaara's entitlement to adjust status is derivative and based

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2. There is some dispute between the parties as to whether Plaintiffs were eligible to file for adjustment of status. Defendants assert that Plaintiffs, who had entered the country legally, were at that time out of status because their respective visas had expired. Plaintiffs admit that they were technically out of status because Plaintiff Kyaga had worked while he was a student and his wife had not actually applied for derivative status as the wife of a lawfully admitted student.

Before January 14, 1998, INA S 245(1), 8 U.S.C. § 1255(1) ("section 245(1)") permitted out of status applicants to apply to adjust status, upon payment of a $1, 000 fee. This provision expired on January 14, 1998. Each Plaintiff 'submitted $1,000 above and beyond the filing fees to the INS, which they assert was to overcome the fact that they were out of status. Defendants maintain that the $1,000 fees were recorded as "other fees," not necessarily "out of status fees", but have not offered another explanation, and have kept the $2,000. Because Plaintiffs. began the application process before January 14, 1998, the court concludes that section 245(1) applied to their applications so that they were eligible to apply to adjust status. *See Int'l. Immigrants Found., Inc. v. Reno*, 1999 WL 787900 (E.D.N.Y. Sept. 29, 1999).

upon her husband's eligibility for a diversity visa, the focus in the instant case is on Plaintiff Nyaga's applications and eligibility for permanent resident status under the 1998 diversity visa program.

After the INS received all of Plaintiffs' application materials in February 1998, Plaintiffs received no further communications from the Government regarding the diversity visa or the adjustment of status. At no time did the Government schedule the interview required for adjustment of status, request additional information, or indicate that there was any problem with his application. Although Plaintiffs did not themselves inquire as to the status of their applications, the instructions from the INS included with the adjustment of status materials read: "While your application is pending before the interview, please DO NOT make inquiry as to the status of your case, since "it will result in further delay." [*See* Pl. Exh. G]. This same correspondence states that adjustment of status applicants will be notified of their interview dates within twelve to eighteen months of receipt of the application. Thus, Plaintiffs would have been justified in not inquiring early into the status of their applications.

The INS sent Plaintiffs' fingerprint cards to the FBZ for processing on February 20, 1998. There is no evidence, however, of any other action by the INS to process Plaintiff Nyaga's diversity visa application since that time, nor is there evidence that the INS even tried to follow up on the fingerprint check. Defendants admit that the INS took no further action on Plaintiffs' applications after sending the fingerprints to the FBI on February 20, 1998.

Appendix B

In February or March, 1998, Plaintiff Nyaga attended an interview at the INS for a temporary twelve-month work permit, at which time he asked the INS representative about the status of his diversity visa. Nyaga states that the INS representative indicated that there was nothing to do about the visa except wait. Plaintiff Kibaara had a similar work permit interview in May or June of 1998, which Plaintiff Nyaga also attended. According to Plaintiffs they again asked about the diversity visa, and again were told there was nothing they could do but wait. Approximately three months before these work permits expired, each Plaintiff had a renewal interview with the INS, and again Plaintiffs contend that, when they inquired, the INS representatives told them there was nothing they could do about the diversity visas but wait. According to Plaintiffs, this same sequence of events occurred once again when their work permits were renewed for a second time. Defendants do not have records of such conversations taking place.

In the interim, Plaintiffs received no correspondence from the Government concerning the diversity visa application or applications to adjust status until Plaintiff Kibaara was notified to appear at the Atlanta INS office on January 23, 2001, for her adjustment of status interview, which both she and Plaintiff Nyaga attended. According to Plaintiffs, at that interview, the INS representative indicated that the diversity visa lottery information could not be located and that Kibaara's derivative application would have to be denied because Nyaga had no diversity visa. The Atlanta District Director of the INS sent a formal denial of Kibaara's application on February 28, 2001, explaining that since the diversity visa program for 1998 expired on September 30,

1998, an immigrant visa was no longer available, despite the fact the Government had failed to act on the application since February 20, 1998.

Plaintiff Nyaga's diversity visa application was not adjudicated or reviewed by the INS before the expiration of fiscal year 1998. The Government admits that the INS Atlanta District office did not follow its own policy and procedure to give higher priority to diversity visa related adjustment of status applications in the instant case. [*See* Def. Rsp. to Pl. Stmt. of Mat. Facts 1 46]. Defendants offer no explanation for this failure to act, aside from suggesting that the INS has more work than it can handle, which is not a very satisfying explanation given the high priority to be given to diversity applicants. The Government's failure to act to process Plaintiff Nyaga's diversity visa application is the sole reason the application was not adjudicated before the fiscal year ended.

Plaintiffs filed the instant suit on May 15, 2001, seeking an Order of Mandamus compelling Defendants to process and adjudicate Plaintiff Nyaga's diversity visa application and both Plaintiffs' adjustment of status applications as if fiscal year 1998 had not yet ended. They do not ask the court to issue the visas itself, as that is not within the court's authority. Defendants have filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In the alternative, Defendants ask the court to consider the motion as one for summary judgment. Plaintiffs oppose Defendants' motion to dismiss or for summary judgment and have filed a cross motion for summary judgment in response.

Appendix B

Jurisdiction

The court turns first to Defendants' argument that the court lacks jurisdiction over this matter. As a general rule, Congressional intent to limit the court's jurisdiction must be clear and convincing before a court will limit a petitioner's access to judicial review. *See e.g. Board of Governors of the Federal Reserve System v. MCorp. Financial Inc.*, 502 U.S. 32, 44 (1991); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Horton Homes, Inc. v. United States*, 936 F.2d 548, 551 (11th Cir. 1991). There is, accordingly, a general presumption in favor of judicial review of administrative actions. *See INS v. St. Cyr,* 533 U.S. 289 (2001) .

Defendants submit that the INA specifically precludes this court from exercising jurisdiction over this matter, under 8 U.S.C. § 1252. Section 1252, entitled "Judicial review of orders of removal" provides:

> (a)(2)(B) Denials of discretionary relief
>
> Nothwithstanding any other provision of law, no court shall have jurisdiction to review
>
> (i) any judgment regarding the granting of relief under section . . . 1255 [adjustment of status] of this title, or
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under [the asylum provisions].

8 U.S. C. § 1252(a) (2) (B) . Consequently, Defendants assert that section 1252 (a) (2) (B) (i) "precludes judicial review of any actions or decisions regarding an application for adjustment of status." [Def. Br. at 8].

Courts interpreting immigration statutes should resolve ambiguities in favor of the alien. *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 449 (1987). In reviewing how other courts have applied section 1252, the court has found that two approaches have been taken, one of which reads section 1252 narrowly, and the other reading it more broadly. Under either interpretation, however, the undersigned concludes that section 1252 does not preclude this court from exercising jurisdiction in this particular instance.

Courts in New York, Texas, Minnesota and Oregon have narrowly interpreted section 1252 as applying only to removal (formerly deportation) proceedings. *See Talwar v. INS*, 2001 WL 767018 (S.D.N.Y. July 9, 2001); *Fu v. Reno*, 2000 WL 1644490 (N.D. Tex. Nov. 1, 2000); *Mart v. Beebe*, 94 F. Supp. 2d 1120, 1123-23 (D. Or. 2000); *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151 (D. Minn. 1999); *see also Burger v. McElroy*, No. 97-CV-8775, 1999 WL 203353 (S.D.N.Y. Apr. 12, 1999) (explaining that Government agreed that section 1252(a) (2) (B) (i), which refers to the adjustment of status provisions, does not apply outside context of removal proceedings).

These courts have considered several factors when arriving at this conclusion. First, the title of section 1252 is "Judicial review of orders of removal," which implies that judicial review is limited only to the context of removal

proceedings, and not adjudications of visa applications. *See e.g. Talwar*, 2001 WL 767018 at *3; *but see Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204 (11th Cir. 1999) (noting that titles and section headings in legislation may be used to interpret ambiguous text, but not to limit the plain meaning.)

These courts have also looked at the act's legislative history to determine that Section 1252's limitation of jurisdiction applies only in removal proceedings. A review of the legislative history does support the conclusion that the provisions of section 1252 are limited to the removal process, as it refers only to removal proceedings and not to visa petitions or any other procedures outside the scope of removal proceedings. *See* H.R. Rep. No. 104-469 at 359, 473. Similarly, language establishing the effective date of section 1252(g) "provides that § 1252 (g) shall apply 'without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act,' thereby implicitly limiting the scope of § 1252(g) to exclusion, deportation or removal proceedings." *Shanti*, 36 F. Supp. 2d at 1158. In addition, Section 1252 replaced the section of the INA that formerly provided the exclusive procedures for judicial review of removal or deportation orders.

One final consideration is that if section 1252 is interpreted to preclude judicial review of matters other than removal proceedings, visa applicants and others impacted by arbitrary or abusive decisions by the INS would be unable

to seek judicial review. Section 1252(b)(2)[3] explicitly provides only that the Circuit Court may review a removal order. This jurisdiction conferring language applies only to review of removal orders. Consequently, if section 1252 applies to more than just removal orders, it would divest the district court of jurisdiction to review even arbitrary INS determinations unrelated to removal proceedings, without substituting an alternative form of review. *See Mart,* 94 F. Supp. 2d at 1124.

Taken together, these factors support a narrow interpretation of section 1252 as precluding district court jurisdiction only in the context of removal proceedings and not with respect to other procedures. Under this view, then, this court would clearly not be precluded from exercising jurisdiction over the case at bar as it is not a removal case. The problem with this narrower view of section 1252 in the context of the instant case is that, by its plain language, section 1252 applies specifically to section 1255 adjustments of status, under which this claim arises.

Several courts, including other courts in this district, have interpreted section 1252 more broadly, concluding that the

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3. Requirements for review of orders of removal

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings . . .

8 U.S.C. § 1252(b)(2).

limitations on district court jurisdiction do apply to denials of adjustment of status under section 1255, because of the provision that "no court shall have jurisdiction to review any judgment regarding the granting of relief under section . . . 1255." *See Iddir v. INS*, 166 F. Supp.2d 1250, 1254-56 (N.D. Ill. 2000); *Paunescu v. INS*, 76 F. Supp.2d 896 (N.D. I11. 1999); *Diallo v. Reno*, 61 F. Supp. 2d 1361 (N.D.Ga. 1999); *Potapova v. Reno*, No. 99-CV-1310-MHS (N.D. Ga. Nov. 29, 1999) (unpublished opinion); *Cf. Talwar*, 2000 WL 767018 at *4 (noting that section 1252 specifically mentions section 1255, so that the jurisdiction limitation may apply also to adjudication of an adjustment of status petition.) For the reasons explained below, the undersigned follows the other courts in this district and adopts the broader view that Section 1252 precludes a district court from reviewing actions or decisions regarding an application for adjustment of status.

In *Iddir*, for instance, the plaintiffs had applied for diversity visas, just like Plaintiffs in the instant matter. Due to a series of clerical delays, the *Iddir* plaintiffs were not interviewed for their visa applications until twenty months after the end of the fiscal year in which they had applied for visas. They filed suit shortly thereafter, and six months later (twenty-six months after the close of the fiscal year of application) the INS "denied" the visas.[4] The court there held that, even though the INS "denied" the

4. It is interesting to note that in *Iddir*, as here, the applicants were advised in correspondence from the INS not to inquire about the status of the application and told that interviews would not be scheduled until after the fiscal year had ended. *See Iddir*, 166 F.Supp.2d at 1255.

applications, the INS had not *adjudicated* their applications so that the court was not precluded by section 1252 from exercising jurisdiction over the case.[5] *See Iddir*, 166 F. Supp. 2d at 1255.

Similarly, in *Paunescu*, the plaintiffs filed suit against the INS to compel the agency to adjudicate their diversity visa applications when such an adjudication had not been made by near the end of the fiscal year. There, as here, no significant action was taken by the INS to process the application in the last seven months before the fiscal year ended.[6] Consequently, the court determined that it had jurisdiction over the claim because the INS's failure to act was not a decision or a discretionary act, but rather a "gross inaction." *Paunescu*, 76 F. Supp. 2d at 896.

In contrast, in *Diallo* and *Potopova* the INS had made final decisions to deny the adjustment of status applications before suit had been filed. *See Diallo*, 61 F. Supp. 2d at 1365; *Potapova* at 1. Accordingly, section 1252 precluded the court from exercising jurisdiction to review those final decisions.

Defendants submit that section 1252(a) (2) (B) "precludes judicial review of any actions or decisions

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5. In *Iddir*, the court ultimately ruled in favor of the INS, finding that the claim was moot. *See Iddir,* 166 F.Supp.2d at 1260.

6. In *Paunescu* the applicant did receive an interview, whereas here, Plaintiff Nyaga received literally no communications from the INS after February 2, 1998, when he completed his application, regarding his diversity visa application.

regarding an application for adjustment of status." In light of the broad view the undersigned is taking of section 1252, the court agrees that it is precluded from reviewing *actions or decisions* regarding an application for adjustment of status. The difficulty with Defendants' position that the court, therefore, lacks jurisdiction over the instant matter is that here, as in *Paunescu* and *Iddir*, no decision has been made regarding Plaintiff Nyaga's visa application, nor has any action been taken to process the application. In other words, Plaintiff is not seeking a review of a decision or action, which would be barred, but is seeking remediation of the lack of action, which is not barred. As a consequence, the court is not precluded from exercising jurisdiction.[7]

Defendants assert, however, that because the fiscal year in which Plaintiff Nyaga applied for the visa has expired, the court should treat the application as therefore automatically denied and not within its jurisdiction. Defendants cite *Kudina v. INS*, 2001 WL 1064789 (N.D. Ill. Sept. 10, 2001), as support for this contention. *Kudina* is clearly distinguishable, as there the plaintiffs admitted that their applications were adjudicated and then denied, even though such processing was untimely. Here no such adjudication has taken place. The court's rightful concern is that individuals who, in good faith, apply for visas and follow the rules set forth by the State Department and local INS offices not be denied the opportunity for meaningful

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7. To the extent that the inaction has been extended by this court's earlier order granting a preliminary injunction to Plaintiffs, the court finds the reasoning in *Iddir* persuasive, that a denial of the application made after Plaintiffs filed this action would not necessarily have been a true adjudication in this instance.

adjudication of those applications due solely to neglect by the INS. In this case, Plaintiff Nyaga followed the directions not to contact the INS about his application, and the INS did nothing with his application after sending his fingerprints to the FBI for analysis on February 20, 1998. While the court is sympathetic to the high work load of INS agents brought about by increasing demands without concomitant increases in resources, nevertheless, the Government failed to process Plaintiff Nyaga's application. Defendants have not offered any explanation for their inaction on Plaintiff Nyaga's application. The court will not reward such gross inaction by concluding that the application was automatically denied when the fiscal year expired.

Furthermore, this court does have mandamus jurisdiction over the instant case. 28 U.S.C. § 1361. Mandamus is proper if Plaintiffs can show a clear right to the relief sought; that Defendants have a clear, non-discretionary duty to act; and no other adequate remedy is available. *See Heckler v. Ringer*, 466 U.S. 602 (1984); *District Lodge No. 166, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. TWA Services, Inc.*, 731 F.2d 711, 717 (11th Cir. 1984); *Storey v. Rubin*, 976 F.Supp. 1478, 1482 (N.D. Ga. 1997). Defendants submit that Plaintiffs do not meet any of these criteria.

The issue of Plaintiffs' right to relief is entangled in the question of Defendants' duty. If there is no duty to act, there can be no right to relief. Accordingly, the court first considers whether Defendants had a non-discretionary duty to act. Defendants aver that because the *decision* whether to issue a visa is not a non-discretionary act, they had no duty toward Plaintiff Nyaga. As explained above, however, the act in

question is not the final decision whether the visa should have been granted, but rather, the act is processing the application, that is, gathering the information necessary to make the final decision. Therefore Plaintiffs assert that the Government has a plain, nondiscretionary duty to adjudicate the application.

The law is quite clear that the court may not compel a discretionary action through mandamus. *See Heckler v. Ringer*, 466 U.S. 602 (1984); *Einhorn v. Dewitt*, 618 F.2d 347 (5th Cir. 1980). The court may, however, compel the Government to exercise its discretion without actually interfering with that exercise. Congress could not have intended that the INS would not have to make diligent efforts to process as many applications and issue as many diversity visas as possible, so that Defendants do not have discretion whether or not to process the applications.[8] *See e.g.* 22 C.F.R. § 42.33 (c). (providing that each fiscal year the number of applicants selected in the visa lottery "shall . . . be sufficient to ensure, to the extent possible, usage of all [diversity] immigrant visas . . ."). Moreover, the statute authorizing diversity visas implies that the visa applications must be reviewed, and that the only discretion the Government has in reviewing the applications is to do so in a random order. *See* 8 U.S.C. § 1153 (e) (2)[9]; *Rahman*, 884 F. Supp. at 787

8. Were the government to have no duty to process the applications, no visas might ever issue, although once the visas are exhausted, clearly the duty has been fulfilled.

9. Diversity visas "*shall be issued* to eligible qualified immigrants strictly in a random order . . ." 8 U.S.C. § 1153(e)(2) (emphasis added).

("Defendants have a clear duty to [process the applications by] interview[ing] the plaintiffs, but they do not have to schedule those interviews on any particular day or in any special sequence"); *see also Agbemaple v. INS*, 1998 WL 292441, *2 (N.D. I11. May 18, 1998) ("by necessary implication the adjudication [of the non-diversity visa] must occur within a reasonable time. A contrary position would permit the INS to delay indefinitely. Congress could not have intended to authorize potentially interminable delays.") Thus, the Government has a nondiscretionary duty to make diligent efforts in furtherance of adjudicating diversity visa applications.

Where, as here, the evidence shows that the Government failed to act to process Plaintiff Nyaga's application, the court may order Defendants to exercise their discretion by ordering them to adjudicate the application thoroughly and make a decision one way or another as if fiscal year 1998 had not yet ended. What this court may not do is mandate a certain outcome in that adjudication, as the final decision is the discretionary act.

Similarly, Defendants maintain that Plaintiffs cannot show a clear right to the relief sought because they "had no right or guarantee to the issuance of a diversity visa." [Def. Br. at 12]. Again, Defendants misstate the relief requested. Plaintiffs' Complaint clearly prays for the court to compel Defendants immediately to "perform their legal duty to complete all remaining process of Plaintiff Charles Kibaara Nyaga's Adjustment of Status." [Pl. Compl. at 15]. As explained above, and as stated in their briefs, Plaintiffs are not asking this court to issue the visa; rather, Plaintiffs

are asking this court to order Defendants to review Nyaga's diversity visa application fairly and in a meaningful way. Defendants are correct that there was no guarantee that a visa would issue, but the court has concluded that the INS was obligated to take steps to process the application in a diligent manner. A determination to the contrary would render the diversity visa program meaningless. Therefore, Plaintiff Nyaga has a right for the visa application to be processed and a final, thorough decision made.

Finally, Defendants submit that mandamus is not Plaintiffs' only possible remedy. Section 1252 (b) (9) provides for judicial review of final orders of removal. 8 U.S.C. 1252 (b)(9). During removal proceedings, an alien whose adjustment of status application has been denied may reapply for an adjustment of status, which could then be judicially reviewed under section 1252(b) (9) as part of the appeal of the final removal order. *See* 8 C.F.R. 245.2(a) (5)(ii). Thus, the Government argues that, as an alternative to mandamus, Plaintiffs should wait for the Government to exercise its discretion to institute removal proceedings to adjudicate fully the diversity visa application. Aside from the fact that removal proceedings have not been initiated despite Defendants' assertion that Plaintiffs have been residing in this country unlawfully since 1997, the court agrees with Plaintiffs that "it is no remedy to a claim of government inaction for the plaintiff to have to continue to wait for action." [Pl. Br. in Resp. at 22, citing *Yu v. Brown*, 36 F. Supp. 2d 922, 933 (D. N. M. 1999)]. It is possible that the Government will never exercise its discretion to institute removal proceedings against Plaintiffs, leaving them in a kind of immigration limbo, without a remedy. Because requiring

Plaintiffs to await removal proceedings does not provide an adequate remedy to the immediate injury of government inaction on the visa application, the court concludes that, for these Plaintiffs, there is no available alternative to mandamus.

Finally, Plaintiffs assert an alternative ground for this court to assert jurisdiction in the Administrative Procedure Act. Because mandamus jurisdiction is clearly proper in the instant matter, the court will not reach Plaintiff's alternative argument. Accordingly, Defendants' motion to dismiss for lack of subject matter jurisdiction is denied.

The court now turns to the merits of the case at bar and the parties' cross motions for summary judgment. Summary judgment is proper when the record and the pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because there are no genuine issues as to any material facts in this matter, the only question remaining is whether either party is entitled to judgment as a matter of law. This inquiry, in turn, rests upon determination of two issues: (1) whether Plaintiff Nyaga has a right to adjudication of the diversity visa application and (2) whether a meaningful remedy is available.

The court has already addressed the question of Plaintiff's right to have his application processed in determining whether mandamus is proper. Accordingly, the court turns to the hotly contested question of whether the Government has the legal authority to effectuate the relief requested.

Appendix B

Although the court has jurisdiction over this matter, and Plaintiffs have a clear right to have Nyaga's application processed, this case presents the difficult question of whether a remedy is available or whether the Government is without power to issue a visa since the fiscal year in which Plaintiffs applied for the diversity visa has ended. Recently, the Northern District of Illinois, in a case with similar facts, determined that, although the court had jurisdiction, the Government's impotence to issue the visa made the claim moot. *Iddir*, 166 F. Supp. 2d at 1258-60. There, the court held that the plain language of section 1154 prohibited the government from issuing diversity visas after the expiration of the fiscal year. *Id.* at 1259. The court distinguished *Paunescu* and another case where the court had ordered the Government to issue visas after the fiscal year ended on the basis that, at the time of the order, the only act remaining for the Government was literally the ministerial act of issuing the visa, as a substantive determination on the merits had already effectively, if not formally, been made.[10] *See Id.*; *Paunescu*, 76 F. Supp. 2d at 903; *Marcetic v. INS*, 1998 WL 173129 (N.D. Ill. Apr. 6, 1998). In *Iddir*, on the other hand, "plaintiffs were never granted any determination in their favor by either the INS or any court before [the fiscal year expired]; they would not have necessarily received visas had the INS adjudicated their applications." *Iddir*, 166 F. Supp. 2d at 1259. *Iddir* is factually distinguishable from the case at bar on one very important basis: in *Iddir*, there was evidence that the INS had acted to process the plaintiffs'

10. This was not an entirely accurate description of the facts in *Paunescu*, as in addition to the ministerial act of issuing the visa number, the FBI fingerprint check also had to be completed.

applications, although the process was not completed in time.[11] Here, no actions were taken since February 20, 1998, when the INS sent Nyaga's fingerprints to the FBI for analysis. Since then, there was no attempt to schedule an interview, and no attempt to conduct the rest of the background check or otherwise complete the adjudication of Nyaga's application.

Moreover, the court respectfully disagrees with the *Iddir* court's conclusion that the statutory language *plainly* prohibits the Government from processing Plaintiff Nyaga's application. The relevant statute provides: "Aliens who qualify, through random selection, for a visa under section 1153 (c) of this title shall remain eligible 'to receive such visa only through the end of the specific fiscal year for which they were selected." 8 U.S.C. 1154 (a) (1) (G) (ii) (II) . This language concerns the eligibility of the alien to receive the visa. Every year there are more eligible applicants than there are visas, as the INS regularly invites roughly twice as many applications as available visas. An alien who is eligible to receive a visa is clearly not guaranteed to receive one. Thus, where the statute says "eligible to receive such visa" it cannot be referring to aliens who will receive visas. Rather, it is referring to those aliens who are eligible to be considered for visas, that is, aliens who have "won" the diversity lottery and are eligible to apply for a diversity visa.

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11. In *Iddir*, the interviews required for processing were scheduled, albeit out of time, indicating that at least a minimum of action was taken on the applications. Thus, although the INS never made a decision, at least there were efforts to complete the process. *Iddir*, 166 F. Supp. 2d at 1253.

Appendix B

The parties do not dispute that Plaintiff Nyaga was eligible to be considered for a diversity visa when he applied in 1997. The parties do not dispute that the INS took no action on Nyaga's application after February 20, 1998, nearly seven months before the expiration of fiscal year 1998. There is no dispute that the sole reason why Vyaga's application was not timely considered is the Government's failure to act or follow through on processing the application. This is not a case where Plaintiff delayed completing the application and the Government had incorrect information, as in *Diallo*, or failed to designate the diversity visa program as the reason for the application, as in *Potopova*. Nor is this a situation where a third party's act of terrorism prevented the Government from completing the process of adjudicating diversity visas.[12]

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12. In 1998 terrorists bombed the United States embassies in Kenya and Tanzania, preventing some diversity visa applicants from being interviewed. In response, Congress passed Public Law 105-360, which allowed the INS to issue fiscal year 1999 visas to eligible 1998 applicants who were impacted by the explosions. Defendants cite to a declaration of Kevin C. Aiston, Deputy Chief of the legal advisory opinions division of the Visa Office, Bureau of Consular Affairs in the U.S. State Department, who explains that the INS finds support for its conclusion that the INA precludes the issuance of any diversity visas after the expiration of the fiscal year from this Congressional action.

Defendants also compare the case at bar to the situation that arose under the 1995 diversity visa program in which a calculation error by the State Department resulted in many more individuals of Polish origin "winning" the diversity lottery than could be awarded visas under the per-country calculation for visa numbers. Because each applicant had such a small chance of actually receiving a visa,

(Cont'd)

Therefore, if Nyaga is no longer eligible for the visa, it is *solely* because of the Government's gross failure to act. The Government maintains that, in essence, it is now impotent to act to remedy its own failure to act. Congress could not have intended for aliens to lose their eligibility to be considered for diversity visas due solely to government inaction. Moreover, no language in the statute prohibits the Government from issuing diversity visas out of time.[13] The statute does not provide that the INS is without power to issue such a visa, or that the visas somehow disappear at the stroke of midnight on the last day of the fiscal year.

(Cont'd)
Congress decided to permit the INS to issue visas to 1995 lottery winners from the 1997 diversity visas, without increasing the total number of visas available in 1997. [*See* Aiston Decl. at ¶ 9; Pub. L. 104-208 § 637].

In both of these situations, however, there was no evidence that the Government did not act diligently to process the applications as they were pending. Rather, these acts of Congress served as an accommodation to the Government and the applicants when even diligence in processing the applications would not have led to a satisfactory result.

13. The regulations come close to providing explicitly that the Government does not have the power to issue visas after the end of the fiscal year. 22 C.F.R. § 42.33 provides in part, "The eligibility for a [diversity] visa . . . ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility." Read carefully, however, the central inquiry in the relevant regulation is whether the alien is still eligible for the visa. As explained above, Plaintiff Nyaga effectively retains his eligibility because the Government did not diligently act to process the visa. The regulation, therefore, does not change the court's analysis.

Appendix B

Plaintiffs rightfully point out that the Government has presented no reason that the visa would not have been granted on the merits of Nyaga's application. Defendants have indicated that the failure to process the application was beyond their control due to the high case load of the INS. The court is not satisfied that the INS was incapable of processing an application that, by all accounts was in order and completed, and was to have been given high priority, within seven months.

The court regrets that it does not have jurisdiction to order the Government to issue a diversity visa immediately to Plaintiff Nyaga, and a derivative visa to Plaintiff Kibaara. The court is empowered to act only within its jurisdiction. Therefore, Defendants are ORDERED to adjudicate Plaintiff Nyaga's diversity visa application as if fiscal year 1998 had not ended, keeping in mind that roughly 3,500 visas were not issued and the fact that there is presently no evidence before the court that a visa would not have been granted on the merits had it been timely adjudicated. Accordingly, Defendants' motion to dismiss or for summary judgment in the alternative [8] is DENIED and Plaintiffs' cross motion for summary judgment [17] is GRANTED, consistent with this order. The court recognizes that granting relief in this instance may appear exceptional. The facts before the court are equally exceptional, and the court therefore specifically limits this case to its facts.

The court hereby orders Defendants to conduct a thorough review of Charles Nyaga's diversity visa application and application to adjust status on the merits as if fiscal year 1996 had not yet expired.

Appendix B

SO ORDERED, this 19 day of February, 2002.

s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED JUNE 20, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12265-DD

CHARLES KIBAARA NYAGA,
DOIN KAINYU KIBAARA,

Plaintiffs-Appellees,

versus

JOHN ASHCROFT, as Attorney General of the United States, ROSEMARY MELVILLE, District Director, Atlanta Division of the Immigration and Naturalization Service,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE